UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMAN D. ABAR, et al.,	)	**No. 94-55624**
Plaintiff-Appellants,	)	
	)	
v.	)	**DC#CV-93-01120-JSR**
	)	**Southern California**
ACandS, Inc., et al.,	)	**(San Diego)**
Defendant-Appellees,	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTHERN CALIFORNIA

PLAINTIFFS-APPELLANTS' REPLY BRIEF*
ORAL ARGUMENT REQUESTED

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*The Petitioner's Reply Brief in the *Miller* matter is identical to this brief and is therefore not reproduced here.

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BACKGROUND

On July 27, 1993, plaintiff-appellants herein filed two separate complaints in the United States District Court for the Southern District of California, *Creighton E. Miller, Administrator of the Estates of Isaac W. Abrahan, et al v. ACandS, Inc., et al.* (Case No. 93 CV 1119) and *Norman Abar, et al. v. ACandS, Inc., et al.* (Case No. 93 CV 1120). Plaintiff's decedents in *Miller* and Plaintiffs in *Abar* was/were erstwhile mariners who were exposed to defendants' asbestos products while serving aboard vessels engaged in maritime commerce. As a result of this exposure, plaintiffs and plaintiff's decedents were afflicted with asbestotic diseases.

Various defendants filed motions to dismiss the complaints in these causes and, on September 9, 1993, the court issued identical orders to show cause, compelling responses to Defendants' Motions to Dismiss. (CR 119 and CR 122). On November 22, plaintiffs filed timely responses to Defendants' motions to dismiss. (CR 123; CR 237). On January 18, 1994, the district court granted defendants' motions to dismiss in each case for failure to state a claim, lack of subject matter jurisdiction, improper venue. (CR 129; CR 137). On January 20, 1994, the court entered judgments consistent with the above orders.

On January 31, 1994, plaintiff timely filed a motion for Relief from Judgment. On March 14, 1994, the court entered an order denying plaintiffs' motion for relief from judgment. On April 14, 1994 plaintiff timely filed Notices of Appeal in the above two causes which stated as follows:

> Notice is hereby given that . . . Plaintiffs in the above-named actions, appeal to the United States Court of Appeals for the Ninth Circuit

> from the Order Denying Motion for Relief from Judgment of Dismissal of the United States District Court entered in this action on the 14th day of March, 1994. (emphasis added).

CR 139: CR 164.

Defendant-Appellees make two arguments. First, defendant argues that plaintiffs are time barred from appealing the district court's order denying plaintiffs' Motions for Relief from Judgment made under Fed. R. Civ. P. 60(b). Second, defendant contends that a denial of a Motion under Rule 60(b) is not a final and appealable order. For the reasons set forth below, neither argument has merit. Thus, this Court must retain jurisdiction over this appeal for a review on the merits.

ARGUMENT

A. Plaintiffs' Appeals are Timely Under Fed. R. App. P. 4(a).

Defendant-appellee contends that plaintiff may not appeal the district court's Order of January 18, 1994. However, plaintiff has not attempted to appeal that order. Plaintiffs' notices of appeal make it patently clear that they are appealing the district court's denial of their Motions for relief from Judgment entered on March 14, 1994 in *Miller* and on March 21, 1993 in *Abar*. In *Miller*, Plaintiffs filed their Notices of Appeal on April 14, 1994, exactly 30 days after the entry of the district courts' denial of those motions as allowed by Rule 4(a).

In *Abar*, plaintiffs filed their notice of appeal on April 15, 1994, before the expiration of the thirty days prescribed by Rule 4(a).[1]

There is no dispute that the notices of appeal from the denial of Relief from Judgment are timely. Even defendant concedes that this Court may review a denial of a Rule 60(b) motion under the abuse of discretion standard.

In fact, there is a recent Ninth Circuit case directly on point which controls the issues raised herein. In *Yniques v. Cabral*, 985 F.2d 1031 (9th Cir. 1993), the district court *sua sponte* dismissed plaintiff's complaint without a hearing. Plaintiff did not file a Notice of Appeal from this Order. Instead, plaintiff filed a motion for reconsideration of the dismissal order pursuant to Fed. R. Civ. P. 60(b). The district court declined to reconsider its dismissal order on May 5, 1991. Plaintiff filed his notice of appeal from the court's denial of the motion to reconsider within the thirty day time limit, on May 31, 1991. This Court of Appeals held:

> Fed. R. App. P. 4(a)(1) requires notice of appeal to be filed within thirty days of entry of

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[1]Defendant argues that the *Abar* appeal is untimely in that it is not stamped "filed" until April 15, 1994. Defendant's argument, however, is without merit. As defendant notes, there are three different dates set forth in the docket for entry of the *Abar* order denying reconsideration. Entry No. 136 states "Entry date 03/21/94." Plaintiff's appealed well within 30 days of this docket entry date. It is black letter law that the "time for appeal commences to run from the date on which the judgment that has thus been set forth in a separate document is entered in the civil docket." *Moore's Federal Practice*, Vol. 9 §204.03, p. 4-18; *see also* Fed. R. Civ. P. 79; *Herrera v. First Northern Savings and Loan Assoc.*, 805 F.2d 896 (10th Cir. 1986). Entry No. 138, upon which defendant apparently relies, merely indicates that the origin order in the *Miller* case was originally entered on March 15, 1994.

> judgment. [Plaintiff] failed to file a timely notice of appeal from the district court's dismissal order. [Plaintiff did, however, file a notice of appeal within thirty days of the court's denial of his Rule 60 motion. That notice of appeal, although timely, is sufficient only to secure jurisdiction over the denial of reconsideration. *Browder v. Director, Dept. of Corrections,* 434 U.S. 257, 263 n. 7 (1978); *Hal Roach Studios, Inc. v. Richard Feiner & Co.,* 896 F.2d 1542, 1546 (9th Cir. 1990); *Hayward v. Britt,* 572 F.2d 1324, 1325 (9th Cir. 1978) (per curiam); *see also* Wright and Miller, *Federal Practice and Procedure*: Civil §2871, at 259 (West 1973) ("[A]n appeal from the denial of the [Rule 60] motion brings up for review only the order of denial itself and not the underlying judgment.")

Yniques, 985 F.2d at 1033.

Given the uncontradicted authority in the Ninth Circuit in this regard, Defendants' arguments must be viewed as bad faith. Moreover, Defendants' failure to advise the Court of the uncontradicted authority cited above is clear violation of the Federal Rules.

B. The Order Denying the Plaintiffs' Rule 60(b) Motion is Appealable.

Defendant-appellees next argue that the court's denial of plaintiffs' rule 60(b) motion is not appealable. The most significant issue on appeal will be whether the judge abused his discretion in failing to allow joinder of these asbestos victims in a single suit. The outcome on appeal will impact the ability

of hundreds of thousands of asbestos victims to obtain access to the courts.

Fel-Pro correctly cites *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064 (4th Cir. 1993), as the controlling case in this matter. In fact, *Domino Sugar* upheld appellate jurisdiction, as we ask the Court to do here.

Domino Sugar, supra, holds that a plaintiff may appeal an order dismissing his claims without prejudice if the alleged deficiency can not be corrected by amendment of the pleadings. *Id.* at 1066. The Court went on to state:

> Under this approach, an appellate court may evaluate the particular grounds for dismissal in each case to determine whether plaintiff could save his action by merely amending his complaint. *Id.* at 1066-67.

This Court must distinguish between Mr. Aaberg, who was purportedly given an opportunity to "save his action" by amendment and the 999 other plaintiffs whose claims were summarily and, without the option of amendment, dismissed for improper joinder. Even Fel-Pro acknowledges that these 999 plaintiffs were left no option under the court's order but to file "individual, particularized complaints."

Because no amount of amendment could cure the perceived joinder defect, nor was an opportunity for such amendment contemplated or allowed by the court, *Domino Sugar* mandates the exercise of appellate jurisdiction.

When claims are separated pursuant to Rule 21 for improper joinder, each severed part constitutes a unit of adjudication for the purposes of appeal. Thus, if a final order

or judgment is entered disposing of all the claims of all parties as to the severed cause, the order or judgment is final and appealable. *United States v. O'Neil,* 809 F.2d 361 (4th Cir. 1983); *Hebel v. Ebersold,* 543 F.2d 14 (7th Cir. 1986); *Spencer, White & Prentis, Inc. v. Pfizer, Inc.*, 498 F.2d 358 (2d Cir. 1974).

C. Rule 20 Joinder Is Appropriate In The Above Captioned "Mass Tort" Case.

Defendant-appellees make the outrageous argument that plaintiffs have failed to establish that there is a "set of occurrences common to all plaintiffs" or "a common issue of law or fact as to all plaintiffs." Again, in their overzealous attempt to justify the district court's disenfranchisement of 1000 asbestos victims of their causes of action against these 94 asbestos manufacturers, Defendant-appellees ignore even the obvious. That these criteria have been established is hardly in dispute.

It can hardly be challenged that these plaintiffs are bound by a common "set of occurrences" in that they were exposed to defendant's asbestos products while serving aboard ships in the maritime careers. It is not said, and it need not be the fact, that all of the Defendants' asbestos products were placed on one ship. It will be established, however, that these Defendant distributors and manufacturers put asbestos products on ships universally within the American Merchant Marine during relevant times and each of the Defendants stood out as energetic competitors vying for the marine market in supplying shipboard asbestos products to the marine industry. Each Defendant placed products aboard one or more ships on which each Plaintiff sailed: therefore, each Plaintiff in this cause was exposed to friable asbestotic products of each Defendant.

Defendant-appellees' reliance on *Malcolm v. National Gypsum Co.*, 995 F.2d 346 (2nd Cir. 1993) is in error. *Malcolm* had nothing to do with Rule 20 joinder. To the contrary, *Malcolm* held that consolidation under Fed. R. Civ. P. 42(a) of 48 claims for trial was improper. *Id.*

> In the instant action, 600 cases were consolidated. The thread upon which all 600 cases hung was that each plaintiff had been exposed to asbestos in one or more of over 40 power-generating stations, or "powerhouses" as they are called in New York State.
>
> Forty eight were selected from the 600 cases for *trial* on a reverse bifurcated basis, *i.e.* damages to be tried first and then liability.

Malcolm, 995 F.2d at 350. Interestingly, no challenge was ever made to the initial consolidation of 600 cases for pre-trial proceedings. In this regard, the Court noted:

> Federal Rule of Civil Procedure 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in this action..." As we recently noted,
>
> **Consolidation of tort actions sharing common questions of law and fact is commonplace. This is true of asbestos-related personal injury cases as well.**
>
> The trial court has broad discretion to determine whether consolidation is appropriate. In the

> exercise of discretion, courts have taken the view that considerations of judicial economy favor consolidation. However, the discretion to consolidate is not unfettered. Considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial.

Malcolm, 995 F.2dat 350.

It has never been plaintiffs' contention or intention that all of these cases against all of these defendant asbestos manufacturers be tried at one time. It may ultimately happen that those cases which are not resolved during the MDL pre-trial discovery and settlement procedures will be separated into groups for consolidated trial based on such factors as service history as set forth in *Malcom, supra*. This prospect, however, is miles down a very long road.

In any event, even the *Malcolm* Court acknowledged that individual adjudication was no longer a viable option for federal courts dealing with asbestos litigation.

> One of the greatest challenges facing both state and federal courts is the crush of tort suits arising from the extensive use of asbestos as flame-retardant insulation throughout much of this century. Asbestos litigation today constitutes the largest mass toxic tort in the United States.
>
> * * *
>
> Asbestos fibers - - which contain highly toxic carcinogens - - have debilitated and killed many workers. Asbestos-related injuries are

> characterized by prolonged latency periods and typically do not become apparent until years, and in some cases decades, after exposure.
>
> * * *
>
> For example, recognizing that "[t]he heyday of individual adjudication of asbestos mass tort lawsuits has long passed," the Judicial Panel on Multidistrict Litigation ordered the pre-trial consolidation of 26,639 pending asbestos cases in July 1991.

Malcolm, 995 F.2d at 348.

In contrast to *Malcolm, supra,* wherein a large number of cases were consolidated for trial, plaintiffs herein have employed Rule 20 joinder for the *pre-trial* phase of these proceedings. Joinder of plaintiffs and defendants is premised on the mandate of coordinated pre-trial proceedings established by multi-district litigation. All of the asbestos cases brought by these merchant mariners are destined to be set on the special maritime asbestos docket, 2-MDL-875 for the purposes of coordinated discovery and settlement negotiations. Under 2-MDL-875, *there is no difference in treatment of these cases whether filed individually or as joined actions.*

Plaintiffs remain mindful of the consideration set forth in *Malcolm, supra,* that efficiency be achieved without substantial prejudice to either party.

> Addressing the complaints of hundreds of thousands of severely injured asbestos plaintiffs, while safeguarding the rights of the defendants, all the while searching for equitable

resolutions in each case, is a herculean task. Many of the asbestos victims suffered exposure for decades and at many different work sites. Finding an appropriate forum to resolve all these claims with minimal delay is the goal. Faced with this challenge, district judges throughout the country have reacted with commendable ingenuity. Pre-trial consolidation for the purposes of discovery, the appointment of special masters to expedite settlement, and especially, the liberal use of consolidated trials have ameliorated what might otherwise be a sclerotic backlog of cases.

* * *

The benefits of efficiency can never be purchased at the cost of fairness. As we recently stated:

> [W]e are mindful of the dangers of a streamlined trial process in which testimony must be curtailed and juror must assimilate vast amounts of information. The systemic urge to aggregate litigation must be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's - - and defendant's - - cause not be lost in the shadow of a towering mass litigation.

Malcolm, 995 F.2d at 349.

It is interesting that, even in Defendant-appellee's brief, they have failed to identify a **single instance of prejudice** which will be visited upon them by joinder, let alone substantial prejudice.[2] In the context of MDL and specifically the special maritime docket, Rule 20 joinder is the only efficient mechanism by which these asbestos victims can access the court system. Unlike joinder in any other context, a denial of the right to join claims is a denial of justice altogether for many of these claimants.

D. Plaintiffs' Complaint Meets the Notice Pleading Requirements of Rule 8(a). The Court's Order Compelling More Detailed Allegations is Reversible Error.

Defendant-appellees argue that "The Complaint was utterly void *of factual information* that it failed to comply with the most rudimentary requirements of notice pleading." Defendants just don't get it. There is no requirement to plead "facts" under Rule 8(a). To the contrary, pleading "specific facts" is "inconsistent with the modest pleading requirements of Rule 8(a)." *DiMella v. Gray Lines Boston, Inc.,* 836 F.2d

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[2]We note that law firms representing asbestos manufacturers stand to amass huge fortunes by the parceling of claims into single units. In Ohio, for instance, where individual claims have been pursued, defense firms are able to file the identical motion hundreds, if not thousands, of times. Responses and replies to such motions increase the work load of plaintiffs and the court proportionately. The amount of paper which is being expended in the effort simply to lodge objections to Defendant's motions for the record is unprecedented. Yet, there is little we can do to stop this sacrilege. Every piece of paper represents another dollar bill in the pocket of a defense firm. Their self-interest, of course, is always to increase, not decrease, the effort involved.

718, 721 (1st cir. 1988) (reversing district court's dismissal of complaint for failing to plead "facts").

"The modern philosophy is that pleadings do little more than indicate generally the type of litigation involved... A generalized summary of the case that affords fair notice is all that can be expected." *Moore's Federal Practice,* 2A, p. 8-11. "The history of litigation under the [old] Equity Rule led the Advisory Committee to conclude that the requirements of pleading facts was illusory and unsound." *Moore's Federal Practice,* 2A, p. 8-54. "No pleading of 'facts,' 'ultimate facts,' or 'facts sufficient to constitute a cause of action' is required." *Moore's Federal Practice,* 2A, p. 8-55. *See also Walker v. South Central Bell Tel.,* 904 F.2d 275 (5th Cir. 1990) (no need to plead elements of cause of action); *Wade v. Johnson Controls, Inc.,* 693 F.2d 19 (2d Cir. 1982) (no pleading of facts required under Rule 8(a)); *Great Atlantic & Pacific Tea Co. v. Amalgamated Meat Cutters,* 410 F.2d 650 (8th Cir. 1969) (specific facts not required); *Austin v. House of Vision,* 385 F.2d 171 (7th Cir. 1967) (plaintiff need only make a brief statement sufficient to give notice of the claim against it).

Yet, the district court has required plaintiffs to plead specific and detailed facts with regard to admiralty jurisdiction, product identification and exposure.

With regard to admiralty jurisdiction, the law in this regard could not be more clear and is uncontroverted. Pleading "Rule 9(h)" in the complaint is a *per se* sufficient to plead admiralty jurisdiction. *See T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.,* 702 F.2d 585, 588 (5th Cir.), *cert. denied,* 464 U.S. 847, 104 S.CT. 151, 78 L.Ed.2d 141 (1983); *cf.* 5 Wright & Miller, Federal Practice and Procedure: Civil 2d §1313 at 719 (1990) (preferred technique is to expressly invoke Rule 9(h). *Teal v. Eagle Fleet, Inc.,* 933 F.2d

341, 345 (5th Cir. 1991) (same). Defendant-appellees have failed to cite a single case to the contrary. Under the authority set forth above, requiring plaintiffs to plead such specific facts is inconsistent with and directly contrary to Rule 8(a)'s mandate of a "short and plain statement of the claim."

Plaintiffs have, as set forth in Appellees own Brief, put these defendants on notice that they are merchant mariners, bringing claims under general maritime product liability law for injuries resulting from exposure to asbestos products manufactured and/or distributed by these defendants while serving aboard vessels. By their own words, Defendant-appellees are on notice of the "the basis of the complaint and the legal grounds claimed for recovery." *See Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990).

Finally, the district court completely ignores the fact that all of the matters which defendants seek to have specifically plead in the complaint will be the subject of discovery as part of MDL or, alternatively, as a pre-requisite to settlement.

While documentation of each plaintiff's service history in the merchant marine, matters of product identification and exposure may be possible for individual filings against a relative few defendants, such pleading would be a virtual impossibility herein. Even a complaint brought by a single merchant mariner against 94 defendants would require hundreds (if not thousands) of pages under the court's ruling. Such a complaint could not be filed consistent with Rule 8(a) and Rule 11. The district court's insistence on creating special pleading requirements and its refusal to consider the availability of MDL has placed these asbestos victims in a "no win" "no option" situation. These asbestos product

manufacturers will have succeeded in their most lofty goal, barring asbestos victims from the courthouse altogether.

On the other hand, such specific facts can efficiently be disclosed in discovery. Such discovery would, as contemplated by MDL, occur over a manageable period of time in a coordinated and organized fashion.

CONCLUSION

Consistent with their behavior before the lower court defendant seeks to cloud the truth, to incite confusion and stonewall justice. There is no question that the immense human tragedy of asbestos exposure instigated by these Defendants has brought upon litigation of heretofore unprecedented proportion. It is the breadth of the tragedy bestowed on the victims of asbestos exposure by these Defendants which drives the breadth of this litigation. It is unconscionable that they should now complain and point a finger of impropriety at their victims. Joinder in the context of mass tort is consonant with the very ethic of federal civil procedure which mandates that courts guarantee litigants a

forum "to secure the just, speedy and inexpensive determination of every action." Fed.R. Civ. P. 1.

RESPECTFULLY SUBMITTED,

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